

**PLACER COUNTY SUPERIOR COURT
CIVIL LAW AND MOTION TENTATIVE RULINGS
TUESDAY, DECEMBER 13, 2022**

These are the tentative rulings for civil law and motion matters set at **8:30 a.m. on Tuesday, December 13, 2022**. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by **4:00 p.m., Monday, December 12, 2022**. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

Except as otherwise noted, these tentative rulings are issued by the **HONORABLE TRISHA J. HIRASHIMA** and if oral argument is requested, it will be heard in **Department 31**, located at 10820 Justice Center Drive, Roseville, California.

<p>PLEASE NOTE: REMOTE APPEARANCES ARE STRONGLY ENCOURAGED FOR ALL CIVIL LAW AND MOTION MATTERS. (Local Rule 10.24.) More information is available at the court's website: www.placer.courts.ca.gov.</p>

1. S-CV-0039661 Miner's Camp v. Foresthill Public Utility Dist.

The petitioner's motion for determination of reimbursement is continued to be heard **December 20, 2022 at 8:30 a.m. in Department 31** by the Honorable Commissioner Michael A. Jacques. The court apologizes to the parties for any inconvenience.

2. S-CV-0043567 Alves, Steven G. v. Feinberg, Herbert

The Motion for Summary Adjudication as to the Liability on the First and Second Causes of Action is continued on the court's own motion to January 3, 2023, 8:30 am in Department 31.

3. S-CV-0046091 Bakos, Matthew C v. Roach, William

The Motion for Summary Judgment or, in the Alternative, Summary Adjudication, is continued on the court's own motion to January 3, 2023, 8:30 am in Department 31.

4. S-CV-0046261 L.A. Comm. Group Inc. v. USA Automotive Supply Inc.

In light of the notice of bankruptcy stay filed on October 31, 2022, this matter is set for an order to show cause re bankruptcy stay on February 6, 2023 at 3:30 p.m. in Department 40. The demurrers to cross-complaints may be re-noticed at a later date.

5. S-CV-0046361 Fialho Family Trust v. The Willis K Polite Jr. Trust

Defendant / Cross-complainant is advised the notice of motion must include notice of the court's tentative ruling procedures. (Local Rule 20.2.3(c).)

Motion to Compel Compliance

Defendant and cross-complainant Willis K Polite moves to compel Plaintiffs and cross-defendants Helio Fialho and Therese Fialho 15 documents designated in the Fialhos' privilege log as covered by the attorney-client privilege.

As a preliminary matter, the court must dispense of the argument the instant motion is time-barred. A motion to compel further responses is subject to a 45-day limit that case law has interpreted to be jurisdictional. (Code Civ. Proc., § 2031.310, subd. (c); *Sexton v. Superior Court* (2d Dist. 1997) 58 Cal.App.4th 1403, 1410.) The cases the Fialhos cite for the proposition that the instant motion is a motion to compel further responses rather than a motion to compel compliance are cases involving the sufficiency of the objections rather than, as here, the applicability of the privilege. The instant motion is a motion to compel compliance pursuant to Code of Civil Procedure section 2031.320(a), for which there is no fixed time limit. Accordingly, the instant motion is not time barred and the court will review the motion on its merits.

The attorney-client privilege applies to confidential communications between client and lawyer. (Evid. Code, § 954.) A "confidential communication" is defined as:

information transmitted between a client and [their] lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of the relationship.

(Evid. Code, § 952.) The right to claim attorney-client privilege is waived if the holder of the privilege (i.e., the client) discloses the communication to any third party. (Evid. Code, § 912, subd. (a); Evid. Code, § 953, subd. (a) [defining "holder of the privilege"].)

However, "[a] disclosure that is itself privileged is not a waiver of any privilege," and a disclosure to a third party "when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer[] . . . was consulted, is not a waiver of the privilege." (Evid. Code, § 912, subd. (d).) Disclosure of a confidential communication to a third party may be reasonably necessary where the third party is an

agent or expert. (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 915; Evid. Code, § 912, comment on subdivision (d).)

The Fialhos present evidence the emails are between the Fialhos and hired experts Kevin Agan and Jonathan Pease (all non-lawyers), the emails were authored at a time the Fialhos had enlisted legal counsel to address legal issues forming the basis of the underlying facts in this case, each email contains confidential communications of legal advice or discussion of legal strategy by the Fialhos' attorneys, and the disclosure was reasonably necessary to the purpose of the attorneys' retention. Thus, the Fialhos sufficiently show the communications come within the waiver exception of Evidence Code section 912(d). Accordingly, the motion to compel compliance is denied.

6. S-CV-0046695 Rodgers, David A v. Sullivan, John L

Plaintiff's Motion to Compel Deposition and for Sanctions

Plaintiff's motion to compel the deposition of defendant Michele R. Sullivan is granted. (Code Civ. Proc., § 2025.450, subd. (a).) Plaintiff establishes good cause for the need for the deposition. Further, plaintiff has proposed numerous accommodations which are reasonable in light of the objections raised by defendant regarding her physical and medical conditions.

The defendant Ms. Sullivan is ordered to appear at a deposition within 30 days of service of this order. The parties are directed to forthwith meet and confer on a mutually agreeable date and reasonable accommodations for the deposition.

Plaintiff's request for sanctions is denied as imposition would be unjust in this case. (Code Civ. Proc., § 2025.450, subd. (g)(1).) Further, the amount of sanctions requested with respect to this motion is excessive and unreasonable.

7. S-CV-0047781 Lane, David v. Lane, Carin

Ruling on Request for Judicial Notice

The court takes judicial notice of the existence of the subject filings, but not the truth of the matters stated therein.

Ruling on Demurrer

Defendants Carin Lane, Larissa Heinrich, and Angela Magario demur to the complaint for claims of defamation, negligent infliction of emotional distress and intentional infliction of emotional distress.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The court assumes the truth of all facts properly pleaded, and

accepts as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6. A plaintiff need not plead facts with specificity where the facts are within the knowledge and control of the defendant and are unknown to plaintiff. *Credit Managers Association of Southern California v. Superior Court* (1975) 51 Cal.App.3d 352, 361). However, the court does not assume the truth of contentions, deductions, or conclusions of facts or law. *Id.*

Defamation

In the first cause of action of defamation, plaintiff failed to provide sufficient material facts to establish a claim for defamation against any defendant. In this matter, defamation per se requires that 1) the defendant made one or more statements to persons other than plaintiff; 2) that those persons reasonably understood that the statements were about plaintiff; 3) that those persons reasonably understood the statement to mean that plaintiff (as alleged) had committed a crime and was abusive; and 4) that defendant failed to use reasonable care to determine the truth or falsity of the statements. Statements are defamatory per se if there is no need for explanation or a pleading of extrinsic facts to understand the meaning of the statement. If the recipient of the information requires additional information not generally known to understand the statement, then it is defamation per quod. *See Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5.

Another element of the claim is a failure to use reasonable care to determine the truth or falsity of the statements. CACI Jury Instruction, No. 1704. “The jury should be instructed that the defendant’s negligence is an element of libel if the plaintiff is a private figure.” *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016. Plaintiff failed to provide any material facts regarding the administrators’ actions, instead giving a boilerplate recitation of the elements with defendants’ names inserted. There is no indication that defendants had been informed the statements were false or that they needed to be removed from the group page.

From the face of the pleading, there are insufficient facts to support the claim against any of the defendants. Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. Although plaintiff has requested leave to amend, he does not state any manner in which the second amended complaint could be amended to cure the defects noted herein. Nor is it apparent to the court that the second amended complaint is susceptible to amendment to correct issues identified with claims against defendants Heinrich and Magario. However, the court can envision changes to the third amended complaint that could correct the issues on this claim, but only in regards to defendant Lane.

The demurrer is sustained as to the first cause of action. The court grants leave to amend, only with respect to defendant Lane. The demurrer is sustained without leave to amend as to defendants Heinrich and Magario.

Negligent Infliction of Emotional Distress

The second cause of action is for negligent infliction of emotional distress. This cause of action requires a showing of severe emotional distress. “Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.” *Fletcher v. Western Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397

NIED also requires a showing of the traditional elements of negligence. “ ‘[The] negligent causing of emotional distress is not an independent tort but the tort of negligence’ ‘The traditional elements of duty, breach of duty, causation, and damages apply.’ ” *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 Plaintiff fails to allege facts demonstrating that any defendant owed him a duty of care.

Plaintiff has failed to provide sufficient materials facts to support a claim of NIED against any of the defendants. It is not apparent to the court that the second amended complaint is susceptible to amendment to correct issues identified with this claim. The demurrer is sustained on the second cause of action, without leave to amend.

Intentional Infliction of Emotional Distress

The third cause of action is for intentional infliction of emotional distress. “A cause of action for intentional infliction of emotional distress exists when there is ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.’ A defendant’s conduct is ‘outrageous’ when it is so ‘extreme as to exceed all bounds of that usually tolerated in a civilized community.’ And the defendant’s conduct must be ‘intended to inflict injury or engaged in with the realization that injury will result.’ ” *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051

“[W]hether conduct is outrageous is ‘usually a question of fact’ [However] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law.” *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235

Plaintiff has failed to sufficiently plead material facts regarding outrageous conduct or severe emotional distress. It is not apparent to the court that the second amended complaint is susceptible to amendment to correct issues identified with the claims of IIED regarding all defendants. The demurrer is sustained for the third cause of action, without leave to amend.

Plaintiff shall file and serve the third amended complaint on or before December 23, 2022.

Defendants' Motion to Strike Portions of the Plaintiff's Second Amended Complaint

Defendants also move to strike the request for punitive damages in the second amended complaint. In light of the discussion above, the motion is dropped as moot.

8. S-CV-0048033 Pocklington, Adrien v. Setter, Bart

The hearing is continued to **December 20, 2022 at 8:30 a.m. in Department 31**. The parties are unable to agree on the terms of sale, including what repairs are necessary to maximize the value of the sale. Mr. Setter believes further legal proceedings will be necessary to effectuate the sale given ongoing disagreements between the parties, and suggests the court will be required oversee the process going forward, with Mr. Setter's counsel to represent the proposed broker.

Appointment of a referee is appropriate and necessary in this matter, notwithstanding the parties' objections. The matter is continued to provide the parties with a second opportunity to identify a proposed referee.

9. S-CV-0048156 Surita, Anna v. Target Corp.

Demurrer

Defendant's demurrer is granted with leave to amend

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The court assumes the truth of all facts properly pleaded, and accepts as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6. However, the court does not assume the truth of contentions, deductions, or conclusions of facts or law. *Id.*

In this matter, the complaint alleges two causes of action, general negligence and intentional tort based on assault, battery, and false imprisonment. The allegations for these claims are completely conclusory, failing to allege facts in support of any of the elements for each claim. In light of the pleading deficiencies, the demurrer is sustained in its entirety as to both causes of action.

The court acknowledges plaintiff's filing of a first amended complaint on December 2, 2022. This filing was without leave of court, and untimely pursuant to Code of Civil Procedure section 472. However, in light of the court's granting of leave to amend, the court declines to strike the amended complaint and deems it to be filed in response to this ruling. Defendant shall file and serve its answer or other responsive pleading within 30 days of the court's ruling.

Motion to Strike

The motion to strike is dropped as moot in light of the court's aforementioned ruling on the demurrer.

10. S-CV-0048367 Forsythe, Paula v. K. Hovnanian Homes No. Cal. Inc.

Demurrer to Paula Forsythe & Paula Forsythe as Successor Interest to the Estate of Kenneth Forsythe's Complaint

Rulings on Requests for Judicial Notice

Defendant's request for judicial notice is unopposed and therefore granted.

Ruling on Demurrer

Defendant K. Hovnanian Homes No. Cal. Inc. (Defendant) demurs to the Complaint for claims of wrongful death, survival action, and loss of consortium.

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action or when the pleading is uncertain. Code Civ. Proc. §§ 430.10(e) & (f). A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The court assumes the truth of all facts properly pleaded, and accepts as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6. "[F]acts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." *Dodd v. Citizens Bank of Costa Mesa*, (1990) 222 Cal.App.3d 1624, 1626. However, the court does not assume the truth of contentions, deductions, or conclusions of facts or law. *Evans, supra.* at 6.

In the case, Plaintiff, as both the successor in interest and as the individual, filed a wrongful death claim for her husband. The complaint alleges that Mr. Forsythe was in a serious bicycle accident when he hit a large electrical cable. While the complaint cited the accident as a cause of death, the attached death certificate provided a significantly different cause of death. Defendant K. Hovnanian demurred to the first cause of action, arguing uncertainty and failure to state a cause of action, citing the conflict between the allegations of the complaint and the determination of death in the exhibit attached to the complaint.

While the facts in the complaint are deemed to be true, the same is said for any exhibits to the complaint. The disparity of the two allegations renders the claim ambiguous and subject to demurrer. The demurrer is sustained as to the first cause of action for wrongful death. Plaintiff is granted leave to amend as to this cause of action, as she may be able to plead additional facts which cure any ambiguities.

The demurrer is overruled as to the second cause of action (survival action) and third cause of action (loss of consortium). Both causes of action rely on the same operative facts, and are sufficiently supported by those facts. It is alleged, and assumed to be true, that decedent suffered serious bodily injury prior to his death from the bicycle crash. Plaintiff, in her role as the successor in interest to the estate, maintains the survival cause of action on behalf of the estate. The loss of consortium is a continuation of that claim from the injured spouse. In this matter, Plaintiff, as the individual, maintains that cause of action.

In reply, the Defendant raises a new argument regarding the sufficiency of the declaration attached to the complaint. The court has not considered this new argument as it was not set forth in the moving papers. *See Alliant Ins. Svc., Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308.

Based on the foregoing, defendant K. Hovnanian's demurrer is sustained as to the first cause of action, with leave to amend, and overruled to the second and third cause of action. Plaintiff may file and serve any amended complaint on or before December 30, 2022.

11. S-CV-0048749 Schroer, Kim v. United Parcel Service Inc.

Defendants are advised the notice of motion must include notice of the court's tentative ruling procedures. (Local Rule 20.2.3(c).)

Laura C. Emadi's Application to Appear *Pro Hac Vice*

Defendants' application for admission *pro hac vice* of Laura C. Emadi is granted as prayed.

12. S-CV-0048901 Khademi, Davood v. Jones, Martin

Demurrer to complaint

The demurrer to the complaint is dropped as moot. Subsequent to filing the demurrer, an amended complaint was filed which appears to recast the allegations of the complaint and add at least one additional defendant. The court also notes that this matter was automatically stayed by defendant's vexatious litigant motion, *infra*, by operation of C.C.P. § 391.6.

Motion to strike portions of the complaint

The motion to strike portions of the complaint is dropped as moot. Subsequent to filing the motion to strike, an amended complaint was filed which appears to recast the allegations of the complaint and add at least one additional defendant. The court also notes that this matter was automatically stayed by defendant's vexatious litigant motion, *infra*, by operation of C.C.P. § 391.6.

Vexatious litigant motion

Defendant Cynthia Woodburn moves to deem plaintiff Davood Khademi a vexatious litigant under C.C.P. § 391(b)(1) & (2), to require defendant to post security in this action pursuant to C.C.P. § 391.1, and for entry of a prefiling order prohibiting plaintiff from filing new litigation in the courts of this state *in propria persona* without leave of the presiding justice or judge pursuant to C.C.P. § 391.7.

Plaintiff is a vexatious litigant as defined in C.C.P. § 391(b)(1). Defendant identifies 23 proceedings filed by plaintiff *in propria persona* within the prior 7 years which were decided against plaintiff. Most of the proceedings are habeas proceedings which are not "litigation" within the meaning of the vexatious litigant statute, and so can neither trigger nor violate vexatious litigant restrictions. *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1101. The remaining proceedings include 7 cases in the United States District Court for the Eastern District of California, including case numbers 2:18-cv-02613, 2:18-cv-02798, 2:19-cv-00437, 2:19-cv-01494, 2:21-cv-01498, 1:21-cv-01394, and 1:21-cv-01261. Each of these claims appears to have been brought by plaintiff acting *in propria persona* and was resolved against plaintiff within the preceding 7 years.

The request to find that plaintiff is also a vexatious litigant under C.C.P. § 391(b)(2) is denied. The information provided by moving party is insufficient to establish that the actions identified above are impermissibly duplicative or repetitive.

The request to require the posting of security in this matter under C.C.P. § 391.1 is denied without prejudice. The motion relies on the complaint without addressing the amended complaint and so does not establish that plaintiff has no reasonable probability of prevailing in this litigation.

The request to subject plaintiff to a prefiling order under C.C.P. § 391.7 is granted. Plaintiff may not file any new litigation in the courts of this state *in propria persona* without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by plaintiff may be punished as contempt of court.
